KRASKIN, LESSE & COSSON, LLP
ATTORNEYS AT LAW
TELECOMMUNICATIONS MANAGEMENT CONSULTANTS

2120 L Street, N.W., Suite 520
Washington, D.C. 20037

Telephone (202) 296-8890
Telecopier (202) 296-8893

December 14, 2001

Jeffrey Dygert
Assistant Chief, Common Carrier Bureau
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Re: CC Docket 96-262, AT&T, Sprint refusal to pay interstate access charges

Dear Mr. Dygert:

My November 27, 2001 letter to Dorothy Attwood on behalf of the Rural Independent Competitive Alliance ("RICA") discussed the refusal of AT&T and Sprint to pay interstate access charges properly tariffed in accordance with Commission's CLEC Access Charge Order. The amounts owed to several RICA members were shown as examples. I understand that AT&T justifies its failure to pay the lawful tariff rates by claiming that some rural CLECs are refusing to provide information verifying the CLECs' qualification to use the rural benchmark. The following information is provided in response to your question as to whether the example companies have provided information to AT&T. This information is provided without prejudice to RICA's position, reiterated below, that AT&T's self-help violates the Communications Act and unambiguous Commission precedent.

As detailed in the attachment, of the eight examples of CLECs which AT&T refuses to pay, four have tariffed rates at the rural benchmark, two are at the 2.5 cent rate, and two are at the ILEC rate. The two CLECs at the 2.5 cent rate which AT&T refused or failed to pay did not receive information demands from AT&T.[1] Each of the four rural benchmark companies and one of the two ILEC rate company received letters from AT&T demanding sworn statements and copies of

[1] HTC Communications, was notified by AT&T on November 20, 2001, that it would be paid following an indefinite period of administrative processing. HTC has not yet received payment. Otter Tail Telcom has received partial payments amounting to less that half the billed charges.

certifications supporting the CLEC's eligibility to use the rural benchmark.[2] Two of the rural benchmark CLECs responded with letters providing essentially the information requested by AT&T and the CLECs charging at the ILEC rate responded with identification of the ILEC.[3] Except as footnoted above, none of these CLECs have been paid or received further inquiries regarding their responses.

AT&T's claim that it is withholding payment pending of verification of eligibility for the rural benchmark is thus without even a factual basis as to four of these CLECs. Instead, AT&T's non-payment is a "ploy" to continue denying rural CLECs the revenues to which they are lawfully entitled. As shown below, the same conclusion not only applies to those CLECs which have not responded to AT&T's demand, but also demonstrates that such responses are futile and that the demands are made solely to avoid or delay payment.

Consolidated Communications Networks objected to AT&T's demand for the reasons set forth in my letter of September 25th. Otter Tail Communications did not respond for essentially the same reasons. Among the reasons for refusing AT&T's demand, Consolidated pointed out that the information requested was not only a matter of public record but had previously been provided to AT&T. In a footnote to its November 9, 2001 response, AT&T asserts that it is not aware of any publicly available source of information regarding Consolidated's service area, and that other information may be publicly available, but is not easy to collect.[4]

This response is misleading and inaccurate. AT&T has sufficient information in its possession regarding Consolidated's service area and the other relevant information is easily obtainable by AT&T, which, after all, created much of the infrastructure of the LEC industry. Further, AT&T's response ignores Consolidated's other point that the information demanded has twice previously been provided to AT&T, first in discovery during the *Advamtel* litigation before the U.S. District Court, and second in the related mediation sessions conducted by the Commission.

Information provided to AT&T in discovery requests and a deposition taken on November 14, 2000 in Washington, D.C. established that Consolidated's service area is limited to Dickinson, North Dakota.[5] Among the exhibits provided to AT&T during the litigation was pre-litigation

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[2] The undated letters were identical to the one attached to my letter to Dorothy Attwood of September 25, 2001. ("September 25 Attwood Letter")

[3] Copies of these response are attached.

[4] Response of AT&T Corp. to Informal Complaint of Consolidated Communications Networks, Inc., November 9, 2001, at, n.1.

[5] AT&T's letter demands documentation of Consolidated's authorized serving area, which is irrelevant to any question under Section 61.26 because although Consolidated has state-

correspondence with AT&T including Consolidated's January 26, 1998 transmission to AT&T of a questionnaire completed at its request. Included in the data provided thereby was the date of certification as a local exchange carrier, the location and CLLI code of Consolidated's switch in Dickinson, the CLLI code for the Qwest access tandem in Bismark, the one NPA/NXX used by Consolidated, and the fact that the tandem association is listed in the LERG. Another exhibit was a December 9, 1998 letter from Consolidated to AT&T advising that Consolidated would be billing AT&T for traffic to its NPA/NXX, 701/483, which had previously be shown in the LERG as assigned to Consolidated's parent. Another exhibit consisted of the access bills sent to AT&T which clearly show that they are only for traffic transiting the host/remote switches in Dickinson. In August, 1999 AT&T wrote to Consolidated's parent stating it wished to participate in the equal access conversion of the parent *and its subsidiary*, and provided the CLLI code for Dickinson. Finally, pages from Consolidated's parent's web site were provided which identified Consolidated as a subsidiary which "aggressively markets and serves dial tone in Dickinson."

Because the population of Dickinson is 16,010 according to the 2000 census, and it is not an urbanized area,[6] necessarily means that Consolidated qualifies as a rural CLEC under Section 61.26(a)(6) of the Commission's Rules. AT&T must be fully aware, from numerous sources, of the fact that the ILEC in Dickinson is Qwest, a price cap, non-rural company which was once owned by AT&T. During the mediation sessions in the Commission's offices in August of this year, Consolidated's Chief Operating Officer reviewed all of the information with AT&T's executive responsible for CLEC access, its in-house and outside counsel, as well as Enforcement Bureau staff. With the knowledge that Consolidated is a rural CLEC because of the lack of a disqualifying place in its service area, and the knowledge that the incumbent, Qwest, is a non-rural carrier, there is no reasonable basis for AT&T to suggest that Consolidated is not eligible for the rural benchmark under Section 61.26(e).

But even if AT&T did not have the information from the Advamtel litigation, it is, contrary to AT&T's claim, easy for it to readily determine if there is any question as to whether Consolidated, or any other CLEC, is entitled to use the rural benchmark, or is offering service in a new MSA. From its data regarding its customer's calls, as well as the access bills, AT&T can easily determine that all of Consolidated's traffic originates and terminates in Dickinson, North Dakota. From the Local Exchange Routing Guide ("LERG") and NECA's Tariff No. 4, AT&T can readily determine that Consolidated's sole exchange is in Dickinson and that the incumbent local exchange

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wide operating authority, in fact, it operates only in Dickinson.

[6] The nearest place with more than 50,000 population, Bismarck, is 100 miles away and Fargo, the only other place in the state with more than 50,000 population is 290 miles away. Although Consolidated operates only in North Dakota, there are no cities of 50,000 population in neighboring South Dakota, Montana or Saskatchewan within several hundred miles.

carrier ("ILEC") is its former subsidiary Qwest.[7]

Either AT&T has totally lost the knowledge and competence it gained in the industry over the last 125 years, or its position is a ploy to delay payment of services which it has received, at a rate for which the Commission has declared conclusively reasonable, and for which it has charged and collected from its customers for the communications involved.[8] AT&T's entirely unfounded claim that there are substantial questions regarding Consolidated's eligibility under Section 61.26(e) which entitled to withhold payment is a serious violation of Sections 201(a) and (b).

By refusing to pay, the tariffed rates AT&T precludes the parties from "enjoy[ing] the convenience of a tariffed service" which was a "virtue" identified by the Commission in the CLEC access order. The Commission's intent that primary jurisdiction referrals be avoided by making the rates conclusively reasonable will be frustrated if AT&T is allowed to refuse payment on the basis of specious claims. Most importantly, AT&T action amounts to constructive denial of service to CLEC subscribers because the CLEC cannot indefinitely provide free service, and it cannot stay in business if customers cannot receive traffic from AT&T subscribers. AT&T's action therefore violates Sections 201(a) and (b) because its refusal of payment necessarily leads to the result described by the Commission in paragraph 93 of the CLEC Access Order:

> any solution to the current problem that allows IXCs unilaterally and without restriction to refuse to terminate calls or indiscriminately to pick and choose which traffic they will deliver would result in substantial confusion for consumers, would fundamentally disrupt the workings of the public switched network, and would harm universal service.

Nothing in the foregoing is intended to imply in any way that it is improper or unreasonable

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[7] AT&T's claim that its demand for information is reasonable because RICA has petitioned for reconsideration of the CLEC Access Order is absurd. It makes as much sense, if not more, for RICA to claim that AT&T's appeal of the Order supports the conclusion that its alleged reasons for refusal to pay are simply a subterfuge to improve its cash flow to finance its appeal. Nor is there any relevance to the Commission's finding that some CLEC rates were excessive prior to June 20, 2001, when that finding was not made with respect to any of the example CLECs which AT&T has refused to pay, nor is it relevant to AT&T's refusal to pay the charges for access after June 19th at rates specified in the CLEC Access Order. The Commission explicitly declined to conclude in that order "that CLEC access rates, across the board, are unreasonable." (Para. 34).

[8] AT&T's statements that the CLECs rates are not within the benchmarks, and that it is not "required to pay invoices which on their face do not comply with the *Order*" are *non-sequiturs,* since the rules adopted by the *Order* provide three benchmarks: a CLEC may file tariffs at the ILEC rate, 2.5 cents, or the NECA rate less the carrier common line charge, with limitations on the eligibility for the later two. Neither the 2.5 cent rate or the NECA rate are any less rates in compliance with the order than the ILEC rate.

for an IXC (as customer) to question a CLEC (as carrier) as to whether a tariff rate has been properly established. It is reasonable for the Commission to expect the carriers to conduct this discussion among themselves, but it is unlawful and unreasonable for an IXC to withhold payment while it unilaterally abrogates to itsself the Commission's function of judging the compliance of tariffs with the rules. Between the filing of the tariffs on June 19th and the receipt of the first bills, AT&T had ample opportunity to question any CLEC for which there could be a reasonable issue as to whether it had filed the proper rates. In most cases, it could be expected that a cooperative exchange of information would occur where the requests are reasonable. Where the requests are unreasonable, such as a demand for sworn statements as to information already in the IXC's possession, coupled with a refusal to pay, AT&T should not be surprised if the CLEC concludes that AT&T is simply trying to "slow roll" payment for financial or political reasons, or both.[9] Where a CLEC did not respond to a reasonable inquiry, AT&T has the option of informal or formal inquiry to the Commission.

There is no statement in the CLEC Access Order, or the rules adopted therein, which supports a conclusion that AT&T's obligation to pay the tariffed rates of a CLEC does not attach unless and until AT&T is satisfied that the rules have been properly applied. Nowhere else in fact or law is there a basis for a conclusion AT&T is free to refuse payment absent sworn statements from a carrier as to information of its choosing, evaluated under standards and timetables chosen by it. The Commission's decisions, and judicial precedent are clear that any challenges to a carrier's tariffed rates must be brought before the regulator, and that the existence of such a challenge is not a lawful basis to refuse payment.[10] The Commission has identified only one exception to this rule, where the tariff and the rate are sham.[11] There is no suggestion and no basis for concluding that any of the charges AT&T has refused to pay are within the sham exception.

Beyond the lack of any factual or legal basis for AT&T and Sprint's refusal to pay tariffed rates, the Commission should be concerned that if it condones such unlawful behavior it will undermine the very policies it has adopted and promoted in implementation of the Communications Act. Rural CLECs have brought substantial improvements to rural communities long ignored by the large ILECs; reliable, modern and advanced services are now available from facilities based carriers,

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[9] As previously stated however, it is highly unlikely that in the sixty seven years AT&T offered service pursuant to FCC tariffs that it refrained from disconnecting service to a customer who refused to pay absent a sworn statement from an AT&T executive that its rates were proper under FCC rules.

[10] *See, e.g., Access Charge Reform,* Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 01-146, para. 60 (rel. Apr. 27, 2001); *AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues,* CCB/CPD No. 01-02, FCC 01-313, para. 18 (rel. Oct. 22, 2001).

[11] *Total Telecommunications v. AT&T,* 16 FCC Rcd 5726 (2001).

a result expected by Congress and supported by the words of many Commission decisions and speeches of its officials.[12]

Words alone, however, will not preserve these public benefits, only action will. Without the revenues due from service they have provided, rural CLECs cannot continue meeting the national objectives, let alone expand them. A failure of the Commission to act consistently with its announced principles will be a clear message to America's rural communities that no one in Washington cares whether modern communication service is available to them, or whether the laws are enforced. Law and policy may be concerned with competition, rather than competitors, but there will be no competition in rural areas is the Commission delegates its review function to AT&T by default.

Sincerely yours

David Cosson
Counsel to Rural Independent Competitive Alliance

Attachment

cc: Magalie Roman Salas, Secretary
Chairman Michael Powell
Commissioner Michael J. Copps
Commissioner Kathleen Abernathy
Commissioner Kevin Martin
Kyle Dixon
Jordan Goldstein
Matthew Brill
Samuel Feder
Dorothy Attwood
David Solomon
James Bendernagel-AT&T
Brian Moore-AT&T

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[12] In November 30, 2001 Remarks to the Association for Local Telecommunications Services, Chairman Powell summarized the key elements of the Commission's competition policy as "(1) Competition remains a critical objective of public policy; (2) We will endeavor to act quickly on competition critical issues to drive out uncertainty in the marketplace; (3) We will continue to strengthen enforcement; (4) We will grapple with key areas of competition in a full and comprehensive manner.

ATTACHMENT

CLEC	Benchmark	AT&T Letter	Response
24-7	Rural	Yes	10/11/2001
HTC	2.5 cents	No	(Has now stated will pay)
Diversified	Mixed	No	
Mid-Rivers	Rural	Yes	9/21/2001
Otter Tail	Rural	Yes	No (partial payment)
CTC	ILEC	No	(Oral advise that at ILEC rate)
Mark Twain	ILEC	Yes	11/19/2001
Consolidated	Rural	Yes	9/10/2001

MARK TWAIN
COMMUNICATIONS CO.

November 19, 2001

AT&T
Ms. Carla McDonald
Access Billing Manager
Room B1320
500 North Point Parkway
Alpharetta, GA 30005

Dear Carla McDonald:

This is in response to your undated letter regarding access rates charged by Mark Twain Communications Company, a copy of which is attached.

Please be advised that Mark Twain's access rates, filed with an effective date of June 20, 2001, are in compliance with the FCC's Order in CC Docket No. 96-262 and I do not understand your allegations that they are not, as stated in your opening paragraph. I would like to know upon what basis you state your opinion that our rates are not in compliance. Would you please provide me with that information?

Mark Twain is competing against Spectra Communications in the Missouri exchanges of Lewistown, La Belle and Ewing. Spectra is a "rural" non-price cap ILEC. Mark Twain's access rates are equal to Spectra's access rates, the incumbent, as required by the FCC Order. AT&T can verify this easily by going to the interstate tariffs filed by Spectra and Mark Twain.

Mark Twain is expecting AT&T to comply fully with the FCC's Orders and to pay Mark Twain's lawfully filed access rates as billed to AT&T. If AT&T will be withholding payment for any reason we would expect an explanation in writing forthwith.

If you should have any questions or comments regarding this matter, please address them to me, as opposed to Mr. Rick Hale.

Sincerely,

Bill Rohde

Bill Rohde,
Exec. V.P. & Gen. Mgr.

P.O. Box 128, Hwy 6 E. Hurdland, MO 63547-0128 Phone: (660) 423-6822 Fax: (660) 423-5496

Mid-Rivers Telephone Cooperative, Inc.

P.O. Box 280, 904 C Avenue
Circle, Montana 59215
Phone: (406) 485-3301
Fax: (406) 485-2924

September 21, 2001

Carla McDonald
AT&T
Room B1320
500 North Point Parkway
Alpharetta, GA 30005

COPY

Ms. McDonald:

Your undated letter received last week states incorrectly that Mid-Rivers' rates for interstate switched access rates are not within the benchmark rates established by the FCC and that AT&T is not obligated to pay such charges for the period after June 20, 2001. To the contrary, the rates set forth in Mid-Rivers interstate tariff for its CLEC division are within the rural benchmark, are conclusively presumed to be lawful and AT&T is obligated to pay the invoiced amounts.

Your letter goes on to demand a sworn certification that Mid-Rivers is entitled to the "rural exemption," and that upon receipt, AT&T will "respond accordingly," whatever that means. There is no basis in the Communications Act, FCC rules, or the FCC's CLEC Access Order for such a demand. We would be amazed if AT&T, as a carrier itself, did not react similarly to a demand by one of its customers for sworn statements in support of its rates.

To the extent AT&T believes Mid-Rivers tariff is in any way not consistent with the ACT or FCC rules, it has the right to file a complaint with FCC, but must pay the tariffed rate unless and until it is found unlawful by the Commission. In this regard the information requested is, for the most part, available through standard industry sources well known to AT&T, or within its business records.

Nevertheless, in the interest of obtaining prompt payment, and on the assumption that AT&T's request is not merely an attempt to delay, Mid-Rivers provides the following information which demonstrates that it is in full compliance with Section 61.26 of the FCC rules. This information is provided without prejudice or waiver of our position that AT&T has no right to demand such information as a condition of payment of our lawfully tariffed rates. Further, Mid-Rivers does not waive and will apply the late payment provisions of its tariff to the current and all subsequent invoices.

1. Mid-Rivers Telephone Cooperative, CLEC Division, provides local exchange service in Fairview, Glendive, Miles City, Sidney, Terry, and Wibaux, Montana. No portion of this service area includes any end users located within either an incorporated place of 50,000 inhabitants or more based on the most recently available population statistics of the Census Bureau, or is in an urbanized area. Mid-Rivers is, therefore, a "Rural CLEC."
2. The CLEC Division is an operating division, no subsidiaries are involved.

3. The only incumbent local exchange carrier in Mid-Rivers' service are is Qwest, a non-rural ILEC, subject to the CALLS order.
4. Mid-Rivers' rates are the same as those in the NECA access tariff, at the highest rate band for local switching, but without the carrier common line charge.
5. State certification and filing of instrastate tariffs is not required in Montana. In any event, such information is irrelevant to compliance with the FCC rules regarding interstate rates.

If prompt payment of our lawful charges is not received, Mid-Rivers will institute any and all appropriate collection measures.

Gerry Anderson
General Manager

AFFIDAVIT

STATE OF MONTANA)
) ss:
COUNTY OF DAWSON)

Gerry Anderson, being first duly sworn, deposes and says:

That he is the Manager of Mid-Rivers Telephone Cooperative, Inc., a corporation, with principle offices at Circle, Montana.

That the information provided above is true and correct to the best of his knowledge and belief.

Further Affiant saith not.

DATED this 21st day of September, 2001.

Gerry Anderson

Subscribed and sworn to before me this 21st day of September, 2001.

Notary Public for State of Montana
Residing at: Glendive MT
My Commission Expires: April 1, 2003

(NOTARIAL SEAL)